



Comptroller General
of the United States

Washington, D.C. 20548

304234

Decision

Matter of: CCL, Incorporated
File: B-251527; B-251527.2
Date: May 3, 1993

Joseph J. Petrillo, Esq., Michael A. Hordell, Esq., and Eric L. Lipman, Esq., Petrillo & Hordell, for the protester. Gerard F. Doyle, Esq., Doyle & Bachman, for Systems Resources, Inc., an interested party. Kenneth John Allen, Esq., and Capt. Gerald P. Kohns, Department of the Army, for the agency. C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency instructed offerors to either submit best and final offers (BAFO) or advise the agency that they did not wish to revise their initial proposals prior to time set for receipt of BAFOs, and awardee submitted its BAFO late, it was improper for the agency to make award on the basis of offeror's initial proposal, where the acceptance period of that offer had expired.

DECISION

CCL, Incorporated protests the award of contracts to Systems Resources, Inc. (SRI) under request for proposals (RFP) No. DAEA08-92-R-0011, issued by the Department of the Army for computer hardware maintenance services. The protester contends that the agency improperly evaluated SRI's proposal.

We sustain the protest.

On May 29, 1992, the agency issued the solicitation for firm, fixed-price contracts for a base year, with a 1-year option period, to provide on-site preventive and remedial maintenance for government-owned NCR Comten communications processors and Amdahl mainframe computers at four Army information processing centers and associated data processing installations located worldwide. The solicitation provided that the agency would make separate awards for each

center and its associated installations, to the lowest cost, technically acceptable offerors.¹

The solicitation contained the clause at § 252.219-7006 of the Defense Federal Acquisition Regulation Supplement, advising that the agency intended to evaluate offers by adding 10 percent to the cost of all offers except those from small disadvantaged business (SDB) concerns. Pursuant to the clause, an SDB concern not waiving the preference agreed to spend at least 50 percent of the cost of personnel for contract performance for its own employees. The solicitation also contained the standard Federal Acquisition Regulation (FAR) § 52.215-10 clause providing for the rejection of late submissions, modifications, and withdrawals of proposals. The first page of the solicitation stated that absent any indication of contrary intent, initial offers would provide a 60-day acceptance period.

Paragraph C.10 of the statement of work, relating to maintenance requirements, provided for an initial maintenance visit, at which the awardee would assess previous maintenance efforts, 5 days after which the awardee would notify the contracting officer of any equipment not maintained in accordance with standards of the original equipment manufacturer (OEM). The contractor was subsequently required to maintain hardware to the standards of OEM specifications, including the installation of engineering changes within 60 days after the OEM made them available and a certification that any replacement parts were OEM-approved; 60 days prior to expiration of each performance period, the contractor was to provide a certificate of maintainability, attesting to its compliance with these requirements.

Paragraph C.11 required a contractor to have access to a complete set of maintenance/software diagnostic routines for hardware, which must perform as required by OEM technical specifications. The contractor was required to maintain the diagnostic software at the current release level. The solicitation provided that "[a]ll third party contractors shall have a formal OEM agreement that the diagnostics will be at the current OEM release level before award."

¹The solicitation contained 22 contract line item numbers (CLIN), with two awards for each processing center for the base and option periods--16 CLINs, 0001 through 0008 and 0014 through 0021. The agency awarded a contract for repair of government-owned modems, CLINs 0009 and 0022 to a third contractor, but these items are not at issue in the current protest. CLINs 0010 to 0011 and 0023 to 0024 represent various data requirements and incidental, cost-reimbursable work. The solicitation contained no CLINs 0012 to 0013.

Three offerors submitted proposals on July 20. SRI did not take exception to the 60-day acceptance period. Nor did SRI waive the SDB preference, although its proposal indicated that it would subcontract most of the work to Amdahl and NCR, the two OEMs. The proposal stated that "[b]oth subcontractors will provide total hardware and software support as well as a full line of complementary services including field engineering, systems engineering and consulting." The proposal also stated that the OEMs would provide the personnel for routine day-to-day service and would have full responsibility and authority for problem management and resolution. The proposal was essentially based upon subcontracting full responsibility for maintenance to the OEMs.

The contracting officer referred the proposals to a proposal evaluation board, which found the awardee's proposal unacceptable and identified several requirements not addressed in SRI's proposal. By letter of August 12, the agency addressed several discussion questions to SRI, asking it to explain how it would perform certain requirements not addressed in its initial proposal. SRI responded by letter of August 17, with its clarifications, a signed copy of amendment No. 0003 to the RFP, and revised prices. SRI provided further pricing revisions by letter of September 3.

By letter dated September 11, the agency requested submission of best and final offers (BAFO) by 2:00 p.m. on September 22; the agency also stated that any offeror who did not wish to change its initial proposal should submit a letter so stating. SRI submitted a BAFO, but it was received after the time set for receipt of BAFOs. The agency decided that it would not consider SRI's BAFO because it was late. Although SRI had submitted an initial proposal--subsequently modified by its letters of August 17 and September 3--the acceptance period for that proposal had already expired. Nevertheless, the agency agreed with SRI to evaluate and consider its initial proposal, as modified by the subsequent correspondence, for award.

SRI's September 3 prices were low for one of the four awards, and with the application of the 10-percent preference to CCL's price, were low enough to displace the protester's proposal for awards at the other three locations. Since application of the 10-percent preference was critical in determining the awardee, the contract specialist spoke with SRI by telephone on October 2 concerning SRI's entitlement to the preference. According to her notes of the conversation, SRI stated that it would "bear all management cost[s] (handling telephone calls, coordinating maintenance personnel, preparing reports, etc.)" and that SRI has a "few maintenance technicians." SRI did not further identify those personnel or what functions they would perform, and the agency did not pursue the matter further.

The agency took no further action until it awarded a contract to SRI on November 25. On that date, CCL filed a protest with the agency, challenging SRI's right to the SDB preference. On December 4, before receiving the agency's response, CCL filed this protest with our Office.

CCL argues that it was improper for the agency to consider SRI's initial proposal for award. CCL also contends that SRI will not incur 50 percent of personnel costs for its own employees and that it was unreasonable for the agency to apply the SDB preference without further investigation into how SRI planned to perform. As explained below, we conclude that the agency improperly considered, and ultimately made award based on, SRI's initial proposal as modified by its September 3 letter.

The awardee's initial proposal had expired by its own terms on September 18, 60 days after its submission and 4 days prior to the date set for receipt of BAFOs. Although the agency argues that the awardee intended to keep its September 3 pricing open for an additional 60-day period, SRI's September 3 letter contains no evidence of any such intention; in fact, the September 3 letter was submitted during the 60-day acceptance period under the initial proposal, and we see no basis to conclude that that letter was intended to extend a period which had not yet expired.

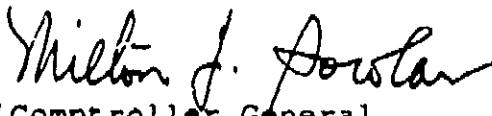
The agency's September 11 letter directed the offerors to respond in one of two ways: either by submitting a BAFO, or by stating that they did not wish to change their initial proposal. Any response to the agency's letter--whether submission of a revised proposal or a statement that the offeror desired that its initial proposal continue to be considered--had to be received timely, i.e., by the time set for receipt of BAFOs. By submitting its BAFO after the common cutoff time, SRI failed to follow the ground rules set up by the agency for continued participation in the procurement. Since SRI's BAFO was late, and its initial offer had already expired, there was in effect no offer from SRI which the agency could accept. Accordingly, the awards to SRI were improper.²

²Given our holding that the agency improperly considered the awardee's proposal for award, we need not reach the other issue which CCL raised--application of the SDB preference to SRI's offer. We note, however, that the contracting officer's conclusion that SRI was entitled to the SDB preference appears questionable. When asked how it would incur 50 percent of the cost of personnel for contract performance for its own employees--as required to be eligible for the SDB preference--in light of its proposal to

(continued...)

We are recommending by letter of today to the Secretary of the Army that the agency terminate the contracts for convenience, and if otherwise appropriate, make award to CCL as the low, technically acceptable offeror. We also find that the protester is entitled to recover its costs of filing and pursuing these protests, including reasonable attorneys' fees, 4 C.F.R. § 21.6(d). CCL should submit its detailed and certified claim for such costs to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.6(f).

The protest is sustained.


Acting Comptroller General
of the United States

²(...continued)

subcontract the services to the OEMs, SRI orally advised the contract specialist that it planned to perform the administrative functions under the contract with its own employees, and that it has a "few maintenance technicians" who presumably would perform some unspecified tasks under the contract. Given the personnel-intensive effort required by the RFP, we question how the contracting officer could reasonably conclude that SRI would incur 50 percent of the personnel costs under the contract--and thus that it was entitled to the SDB preference--simply by performing general administrative tasks and having available a "few" maintenance technicians for unspecified functions.